VII. THE COMMISSION SHOULD ADOPT REGULATIONS TO PROTECT AGAINST THE LEVERAGING OF FOREIGN MARKET POWER

The NPRM seeks comment on whether the Commission's post-entry regulation of foreign carriers in the U.S. market should be modified to reflect the ownership thresholds adopted in this proceeding and to include additional safeguards against discriminatory behavior. AT&T supports the Commission's proposed modifications to the post-entry regulation requirements and suggests that the Commission also require disclosure of foreign carriers' return traffic allocation formulas.[56] Such a requirement would provide more effective protection for unaffiliated U.S. carriers against discriminatory behavior by foreign carriers with U.S. affiliates.

A. Post-Entry Regulation Should Employ The Same Ownership Threshold as The Effective Market Access Test

The Commission's post-entry regulation of foreign carriers in the U.S. market focuses on the prevention of discrimination by a foreign carrier in favor of a U.S. affiliate.[57] This is also a major objective of the Commission's effective market access test.[58] As the Commission observes, any entry by a foreign carrier into the U.S. market

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[56] AT&T disagrees with the Commission's suggestion that foreign-affiliated carriers be allowed to file their tariffs on fourteen days' notice without cost support (NPRM, ¶ 55). There is no justification for foreign-affiliated carriers being given such a competitive advantage over other U.S. carriers.

[57] *Regulation of International Common Carrier Services*, ("*International Common Carrier Services*") 7 FCC Rcd. 7331 (1992).

[58] NPRM, ¶¶ 26, 30. Of course, if the goals of the Commission's market entry proceeding are achieved, and foreign countries are successfully encouraged to develop fully competitive markets, continuing post-entry carrier regulation of foreign carrier affiliates should no longer be necessary to protect U.S. carriers against discriminatory conduct. Pending that outcome, however, such regulation will continue to perform an essential function.

will require post-entry regulation to protect U.S. carriers against discrimination.[59] Such regulation will also be required where the primary market of the foreign carrier passes the effective market access test, but actual competition in the foreign market is not yet sufficient to ensure that the foreign carrier is unable to discriminate against U.S. carriers through its control of bottleneck services or facilities.[60]

Today, the Commission applies a "control" test to determine whether a U.S. carrier is an "affiliate" of a foreign carrier for post-entry regulation purposes.[61] The market power of the U.S. carrier's foreign affiliate then determines whether the U.S. carrier is deemed "dominant" on a particular route.[62] In this proceeding, the Commission has properly concluded, on a tentative basis, that entry review should be triggered by the level of ownership that may confer the incentive to discriminate.[63] As AT&T has shown above, this objective should require the use of an entry threshold no higher than 10 percent. To ensure a consistent approach to its regulation of foreign carriers in the U.S. market, the Commission should adopt the same threshold for post-entry regulation of foreign carrier affiliates. Such a move would ensure continued oversight of all foreign carriers with the potential incentive to discriminate against U.S. carriers.

B. The Commission Should Improve Its Non-Discrimination Safeguards

The Commission proposes to strengthen its regulation of foreign-affiliated U.S. carriers in several important respects. As discussed above in Section III.B, foreign

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[59] NPRM, ¶ 47.

[60] *See* 47 CFR § 63.10 (a)(3).

[61] *International Common Carrier Services*, 7 FCC Rcd. at 7332-33; 47 CFR § 63.10.

[62] NPRM, ¶ 56-57.

[63] *Id.* at ¶ 57.

carriers can discriminate in the manner in which U.S. carriers are provided with interconnection in foreign markets, and through the denial or delay of the provision of other essential facilities. The Commission proposes to require foreign-affiliated U.S. carriers to maintain complete records of the provisioning and maintenance of network facilities and services obtained from their foreign carrier affiliates, which would be similar to the requirements imposed on MCI in connection with its partial acquisition by BT.[64] AT&T fully supports the introduction of this requirement, although in the absence of effective regulation of foreign carriers in their home markets, there can be no assurance that such reporting requirements will identify all possible means of discrimination. The Commission's proposed requirement for a "no special concessions" undertaking[65] from foreign carrier affiliates engaged in joint ventures with U.S. carriers is equally welcome, although such undertakings also cannot offer complete protection against behavior undertaken by foreign carriers in their home markets.

As also discussed above in Section III.B.3, foreign carriers can discriminate among U.S. carriers in the manner in which they allocate return traffic. Small shifts in allocation, which can be hard to detect, can have a significant impact on rival carriers' costs and affect the prices they charge for international services. Although the Commission properly proposes to require affiliates of foreign carriers to continue filing quarterly traffic and revenue reports, it does not seek to require such carriers to obtain and file with the Commission their foreign carrier affiliates' allocation formulas and other information that would provide competing U.S. carriers with improved information on how their share of return traffic is determined. BT was required to supply such information under the

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64 NPRM, ¶ 86; *BT/MCI Order*, 9 FCC Rcd at 3973.

65 NPRM, ¶ 86.

BT/MCI Consent Decree,[66] and AT&T believes that such a requirement should be imposed, as part of the Commission's post-entry regulation of foreign-affiliated carriers, on all foreign carriers that have an incentive to discriminate in favor of their U.S. affiliates.

Foreign carrier acquisitions of U.S. carriers also provide the opportunity for a foreign carrier to use its control over accounting rates to impose a "price squeeze" on rival U.S. carriers. A foreign monopoly has the incentive to maintain above-cost accounting rates to keep U.S. carriers' costs high, while subsidizing its U.S. affiliate through internal transfers. The incentive to engage in such conduct would be significantly reduced by the adoption of cost-based accounting rates, either as the result of competitive pressures in foreign markets or as mandated by U.S. or foreign regulators. In this regard, the Commission's proposed requirement that foreign-affiliated carriers file a complete list of their foreign affiliates' accounting rates with all other countries, together with quarterly notification of all changes to such rates, would be an important step in reducing the ability of foreign carriers to maintain discriminatory rates. AT&T fully supports the Commission's proposal, and anticipates that such information will greatly assist its efforts to persuade foreign carriers to treat the U.S. in a nondiscriminatory manner and to lower accounting rates to cost-based levels.

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[66] *See U.S. v. MCI Communications Corp. and BT Forty-eight Co.*, 59 Fed. Reg. 33,009, 33,019, (1994) (Proposed Final Judgment and Competitive Impact Statement). The provision of foreign carrier affiliates' allocation formulae would not be sufficient to allow U.S. carriers to detect all shifts in return traffic, such as treating IMTS traffic from closed user group locations as VPN on-net traffic. But the availability of such information would certainly reduce the potential scope of such behavior.

VIII. THE COMMISSION SHOULD ADOPT THE NPRM'S PROPOSALS TO IMPROVE ITS REGULATION OF INTERNATIONAL SERVICE PROVIDERS

Adoption of three other proposals contained in the NPRM would improve the Commission's regulation of international services. First, the Commission should replace the "equivalency" test under its International Resale Order with an effective market access test. Second, the Commission should codify its definition of facilities-based carrier. Third, the Commission should prohibit the refiling of international traffic without the consent of both the originating and terminating administrations.

A. The Commission Should Replace the "Equivalency" Test under Its International Resale Order with an Effective Market Access Test

In making an equivalency determination under its International Resale Order, the Commission assesses not only whether the regulatory rules of the foreign country involved offer equivalent opportunities as a matter of law, but also whether market factors in that country offer practical opportunities as a matter of fact.[67] In order to make this assessment, the Commission should consider the same factors that would be considered as part of its effective market access analysis. Indeed, AT&T believes that "equivalency" cannot exist unless U.S. carriers have effective market access in other countries.

Application of a single, uniform standard to Section 214 applications, Section 310(b)(4) common carrier waiver requests, cable landing license applications and international private line resale authorizations would both ensure the promotion of the U.S. public interest on a consistent basis and provide greater certainty and predictability to carriers seeking such authorizations. However, under the International Resale Order, the Commission cannot grant a carrier authority to provide switched services over

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[67] This two-pronged evaluation was made by the Commission in its determination that regulatory reforms undertaken in the United Kingdom would contribute to the development of a viable international private line resale market. *ACC Global Corp.*, 9 FCC Rcd 6240, 6252-55 (1994)

international private lines without a finding of equivalency. By contrast, as proposed in the NPRM, the lack of effective market access would not be dispositive for purposes of foreign carrier entry into the U.S. international services market. In the International Resale Order, the Commission determined that the harm to the U.S. public interest that would be caused by one-way provision of switched services into the U.S. over international private lines required that private line resale authority not be granted unless equivalent opportunities for U.S. carriers had been demonstrated. That same threat of harm to the U.S. public interest requires that the lack of effective market access preclude the granting of any application for authority to provide basic switched services over international private lines. By the same token, because one-way entry to the U.S. international services market by foreign carriers with closed primary markets would threaten far greater harm to the U.S. public interest, the Commission should not permit such foreign carrier entry unless effective market access exists.

B. The Commission Should Codify Its Definition of Facilities-Based Carrier

The NPRM requests comment on the Commission's tentative conclusion that it should continue its policy of treating a carrier as facilities-based in the United States if it purchases an ownership or IRU interest in a U.S. half-circuit in an international satellite or submarine cable (whether common carrier or non-common carrier), or if it leases a U.S. half-circuit from Comsat or from a non-common carrier international satellite or submarine cable provider. Under the Commission's existing policy, the Commission would not treat as a facilities-based carrier a carrier operating abroad that merely obtains private lines (*i.e.*, "private leased circuits") from the incumbent facilities-based carrier, even if such private lines represent the maximum interest allowable under the laws of that foreign country.

The Commission must retain its existing definition of facilities-based carrier in order to avoid vitiating its "equivalency" test under the International Resale Order.[68] The equivalency test was intended to protect the U.S. public interest against the harm that would be caused by one-way provision of switched services into the United States over international private lines. Under the "maximum allowable interest" test proposed by IDB (and supported by MFS), in those markets that do not permit facilities-based competition and do not offer equivalent opportunities for U.S. carriers to provide switched services over international private lines (*i.e.*, those markets where an international private line can be interconnected to the public switched network only at the U.S. end), a reseller sending switched traffic on a one-way basis into the U.S. over international private lines would claim -- as IDB has done -- that it is merely providing facilities-based services and not violating the International Resale Order. U.S. carriers, however, would not be able to provide similar services into the foreign country over interconnected private lines. As a result, foreign carriers and foreign customers would benefit at the expense of U.S. customers, precisely the result the Commission sought to avoid through the International Resale Order's equivalency requirement. AT&T supports the Commission's determination to retain its existing definition of facilities-based carrier, which would preclude such a result.

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[68] As AT&T demonstrates above in Section VIII.A, in determining whether to approve applications for authority to provide switched services over international private lines, the Commission should replace its "equivalency" test with its effective market access test. Adopting the "maximum allowable interest" definition proposed by IDB would negate this standard as well.

C. The Commission Should Prohibit the Refiling of International Traffic without the Consent of Both the Originating and Terminating Administrations

The NPRM seeks comment on whether the Commission should expressly prohibit a foreign carrier or its U.S. affiliate from refiling U.S. originating or terminating traffic, without the consent of the originating and terminating carriers. As AT&T has pointed out in a separate proceeding,[69] the Commission should prohibit such non-consensual refile because it violates both the Commission's long-standing proportionate return policy and International Telecommunications Union ("ITU") Regulations. Moreover, permitting refile of U.S.-destined traffic by foreign carriers and the refile of foreign traffic through the United States to third countries on a non-consensual basis injures U.S. carriers, thereby harming U.S. competition and U.S. customers. Further, foreign carriers with U.S. affiliates will be able to engage in refile more easily because they will not have to go outside the "family" to find a willing participant in this scheme. For these reasons, as part of its rulemaking, the Commission should expressly prohibit not only refile of U.S. originating and terminating traffic, but also the refiling of foreign-originated traffic through the United States to third countries, unless both the originating and terminating carrier agree to such routing of traffic.

IX. CONCLUSION

The Commission's effective market access standard for foreign carrier entry will advance the U.S. public interest by promoting global competition for communications services, by preventing anticompetitive conduct against U.S. carriers and their customers by foreign carriers leveraging their market power, and by encouraging other governments

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[69] *Sprint Communications Company, L.P., Reorigination of International Traffic*, File No. ISP-95-004, AT&T Comments filed March 10, 1995. AT&T hereby incorporates by reference its pleadings in that proceeding.

to open their telecommunications markets. AT&T endorses the Commission's effective market access standard and urges its immediate implementation.

Respectfully submitted,

AT&T CORP.

By Stephen C. Garavito

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Dated: April 11, 1995

Attachment A

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January 18, 1995

Mr. William F. Caton, Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

RE: ISP - 95-002 -- Petition for Declaratory Ruling Concerning Sections 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended by Sprint Corporation

Dear Mr. Caton:

Enclosed herewith for filing with the Commission are an original and four (4) copies of the comments of C. Fred Bergsten in regard to the above proceeding. I request that you include this letter in the above docket as well as in other relevant dockets dealing with similar cases.

Kindly acknowledge receipt of this document by date-stamping the extra copy and returning it in the enclosed self-addressed envelope.

Respectfully submitted,

C. Fred Bergsten

Enclosures

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January 18, 1995

The Honorable
Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554-0001

Dear Mr. Chairman:

The Commission will soon make vital national decisions in its evaluation of AT&T's Rulemaking Petition concerning market entry and regulation of international common carriers. The issues raised in that petition have come to a head with the proposed global partnership among Sprint, Deutsche Bundespost Telekom and France Telecom. I am writing to you in my personal capacity as a former US government official and as a career scholar who has studied, and dealt extensively, with such international trade and financial negotiations for many years.

Telecommunications traffic is a major growth area for US commerce. The market structure of the global industry will affect tens of billions of dollars of US receipts and payments in the decade ahead. It will also significantly shape the future of US carriers. The Institute for International Economics, which I direct, has therefore launched a major study on the prospects for this sector in the rapidly growing Asia Pacific market, closely related to my continuing role as Chairman of the APEC Eminent Persons Group that advises the member governments on future economic cooperation in the region. While the issues are complex, many of them can be resolved if four basic points are observed.

First, any carrier that can offer comprehensive service on a global basis will operate at a great advantage. Only with this capability can a carrier ensure maximum transmission quality and customer satisfaction. US policy should seek to open foreign markets under conditions which will enable every US carrier to offer comprehensive service to every market. The only real policy alternative, as laid out with respect to Japan in my recent book (with Marcus Noland) Reconcilable Differences? United States--Japan Economic Conflict, is to seek entry into controlled foreign markets for a single American firm -- "join them rather than fight them" -- which is decidedly inferior for global and America's economic welfare (and grossly unfair to competitive firms that are excluded).

Second, while US carriers have enormous technical strengths, they usually operate at a severe negotiating disadvantage in dealing with foreign carriers like Deutsche Bundespost Telekom or France Telecom. The US long distance telecommunications market is highly competitive and the local service market comprises several regulated monopolies affording genuinely equal access to all long distance carriers.

These conditions seldom exist in foreign countries. Instead, foreign carriers typically have monopoly powers over both outward long distance and local service. They are not subject to strict equal access regulation. The result is that foreign monopoly carriers can and do negotiate at a huge advantage with competitive US long distance carriers and are able to leverage that monopoly power into the US market.

This is the well-known "sanctuary market" advantage. This advantage can be leveraged through alliance relationships, joint ventures, and takeovers of control or influence of US carriers. Monopoly power can be even more effectively leveraged through direct entry into the US market.

Third, through such unequal negotiations and foreign carrier beachheads in the United States, US carriers will suffer in global competition unless the Commission and US executive branch agencies act in concert to redress the imbalance of negotiating power. That is most effectively done by insisting that foreign markets be opened in ways that reduce or eliminate foreign based monopoly power. We should be seeking to level the playing field *vis-a-vis* the foreign carriers to obviate the advantages they now possess.

Fourth, petitions that directly or indirectly entail greater foreign carrier access to the US market should thus be examined in the wider context of US strategic objectives. The United States should have two such objectives: first, to create conditions that open the foreign market and enable every US carrier to offer comprehensive service between the United States and the home country of the foreign carrier; second, to ensure against price or technical discrimination against US carriers by providers that have gained *de facto* control over effective market access to that foreign country. These objectives should not be hindered by artificially high "accounting rates" or the power of foreign carriers to restrict or unfairly price US carrier access to interconnection facilities.

If the Commission follows this approach in deciding individual petitions for entry or expansion into the US markets, foreign governments and monopoly carriers should be induced to change their current restrictive practices. Open and competitive global telecommunications will be most quickly achieved where those governments and carriers have an incentive to open their markets. Access to the US telecommunications market is such an incentive.

I apologize for failing to meet your earlier deadline for inclusions of views, due to my extensive travel in Asia throughout November relating to the APEC summit in Indonesia and subsequent involvement in the Summit of the Americas in Miami in mid-December. I hope you can still include this letter with the other relevant dockets dealing with similar cases.

Yours sincerely,

C. Fred Bergsten

cc: Commissioner Andrew C. Barrett (Room 826)
Commissioner Rachelle B. Chong (Room 844)
Commissioner Susan Ness (Room 832)
Commissioner James H. Quello (Room 802)

CERTIFICATE OF SERVICE

I, Chris Pereira, do hereby certify that a copy of AT&T Corp.'s Comments, dated April 11, 1995, has been sent by United States mail, postage prepaid, to the parties listed on the attached service list.

Chris Pereira
Chris Pereira

Dated: April 11, 1995

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